MASSACHUSETTS PROPOSAL FOR DEMONSTRATION

AFFECTING ASSETS OF INSTITUTIONALIZED INDIVIDUALS

Submitted by

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1. Introduction

Massachusetts requests approval of this Demonstration Project proposal pursuant to Section 1115(a) of the Social Security Act. Since July 1, 1997, Massachusetts, through the Division of Medical Assistance, has operated a Section 1115 Demonstration Project affecting persons under age 65 who are not institutionalized or participants in community-based programs, such as Home and Community-Based Services Waiver programs, designed for those who would be institutionalized if they were not receiving benefits under these programs.

This proposed Demonstration Project affects individuals who apply for MassHealth-coverage of institutionalized long-term care benefits. It will not affect individuals in community settings, and it will not affect individuals currently receiving benefits under the existing Demonstration Project.

(The terms "institutionalized care," "institutionalization," "institutionalized long-term care," "nursing home care," and similar terms used here incorporate the definition of "institutionalized individual" in Section 1917(e)(3) of the Social Security Act [42 U.S.C. §1396p(e)(3)]. However, as described below, the Demonstration will not apply to those living in the community. The term "assets" is used here in its ordinary meaning, which is the same as the definition of "resources" in Section 1917(e)(5).)

1.1. Purpose of Demonstration.

The objective of this proposed Demonstration Project is to discourage Medicaid applicants from making large transfers of assets for the purpose of qualifying for Medicaid payment of their institutional long-term care services. Over a period of many years, the Division of Medical Assistance has observed numerous tactics employed by estate planners to enable their clients to divest their wealth so that they may qualify sooner for Medicaid long-term care benefits. The items in this proposal address such observed tactics.

This proposal is based on the belief that it is reasonable and fair to expect individuals who are fortunate enough to have adequate resources to use their own resources to pay for their nursing home care. Although there already are statutory provisions aimed at preventing the improper transfer of assets to qualify for coverage under Medicaid, we believe there are strong public policy arguments for enhancing the limits on such transfers.

Limited public dollars are available for Medicaid coverage. It is important for these limited public resources to be used to assist those individuals who cannot afford to provide for their own nursing care needs. In contrast, those individuals who have sufficient resources should be expected to pay for their own care. Our proposal would target those who have voluntarily transferred their resources so that they are no longer available to pay for nursing home care, but still protect individuals who need Medicaid to

pay for nursing home care due to undue hardship. Such transfers include, but are not limited to, transfers for less than fair market value.

The federal rules regarding transfers of assets are designed to deter individuals from divesting their assets in order to qualify for medical assistance and to penalize those who do divest their assets. However, as currently designed, the rules do not provide sufficient deterrence and suffer from several loopholes. These loopholes are exploited by sophisticated estate planners who help individuals with substantial assets to fully or partially avoid a penalty period by transferring those assets to a third party. This divestment shifts the cost of care from individuals with the ability to pay to the state and federal governments.

In addition, this shift takes money that should be devoted to those who cannot afford to pay for their medical care and directs it towards those who can afford to pay for their medical care. Instead of being a program to pay for the medical care of those in need, as envisioned by the Medicaid Act (Section 1901 of the Social Security Act), Medicaid becomes a program that also pays for the medical care of those who can afford to pay for it themselves but voluntarily impoverish themselves so that the state and federal governments pay for it instead. Since the source of public funds is limited, those who can afford to pay for their own care but voluntarily impoverish themselves effectively take money from the poor, leaving the Medicaid program with insufficient funding to provide for their health care needs. Thus, this proposal is designed to better fulfill the original objectives of the Medicaid Act.

This proposal will help prevent individuals with the ability to pay for services from receiving Medicaid assistance, while avoiding any increase in the burden on individuals in need. Although entirely eliminating estate planning aimed at qualifying for medical assistance is impossible, the Commonwealth of Massachusetts (the Commonwealth) believes that the changes proposed for this Demonstration Project will lead to a significant reduction in both the success and the quantity of this type of estate planning that currently saps health care dollars from state and federal governments.

Should the demonstration be effective, it will provide a national model for other states and provide guidance to Congress for enacting new laws that will effectively preserve health care money so that it can be more effectively targeted to those in need.

1.2. Components of the Demonstration Project

This proposed Demonstration Project contains the following components (each of which is described in more detail below):

- Increase the look-back period to 60 months for transfers of real estate and to 120 months for transfers into irrevocable trusts;
- Change the start-date for the penalty period to the later of the date of entry into a nursing home, the date the person would have been eligible for Medicaid

coverage of long-term institutionalized care had the transfer not occurred, or the date of the transfer;

- Classify the purchase of annuities during the look-back period as transfers for less than fair market value unless the Commonwealth is named as a remainder beneficiary of the annuity for a value up to the total amount expended by MassHealth for the individual's institutionalized care;
- Change the treatment of assets transferred after the spousal assessment, or after the applicant has been denied MassHealth due to excess assets, such that all expenditures are deemed to be transfers for less than fair market value unless they are used for:
    1. Medical care;
    2. Necessary living expenses;
    3. Necessary home maintenance (not home improvements);
    4. To purchase an actuarially sound annuity that names the Commonwealth as a remainder beneficiary for a value up to the total amount expended by MassHealth for the individual's institutionalized care;
    5. To purchase an actuarially sound annuity that provides the community spouse with a monthly income of no more than the minimum monthly maintenance needs allowance (MMMNA) when combined with other sources of income; or
    6. To purchase a long-term care insurance policy for the applicant or spouse meeting standards set by the Division.
- Include the transfers of non-countable assets in the calculation of the penalty period if the fair market value of the non-countable assets is greater than $20,000;
- Penalize "suspicious" successive transfers of assets as transfers for less than fair market value; for example, where the first transfer is a permitted transfer that is immediately followed by a further transfer of the same property that would have been impermissible had it occurred first;
- Treat equity loans payable by a community spouse as transfers for less than fair market value unless the loan amount is used for necessary home maintenance, medically necessary health care, or necessary living expenses.

The following limitations on these new rules will apply:

- Thresholds will be established so that transfers below a certain amount will not be subject to the new rules;
- Hardship provisions will protect vulnerable populations and make exceptions where it is fair to do so;
- No changes will be made in the methodology for calculating the length of the penalty period;
- No changes will be made in the rules establishing permissible transfers [Section 1917(c)(2)], except as provided in Section 7 (pertaining to sequential transfers).
- No changes will be made to the "spousal impoverishment" rules;
- Persons living in the community and receiving long-term care in lieu of institutionalization will not be affected by the new rules.

- If a primary residence with a fair market value of $300,000 or less is transferred without compensation, then the transfer will be treated under existing law as though a waiver was not in effect.

1.3. Effective Date

The rules of the Demonstration Project will apply to all applications filed with the Division on or after the effective date of these rules. The effective date will be on or after the day new regulations incorporating these rules are adopted and published in the *Massachusetts Register*.

2. Look-Back Period

2.1. The Problem

As required by federal law, when an individual applies for Medicaid coverage for institutionalized care, all of the individual's financial transactions are reviewed for a specific period of time preceding the application for medical assistance. [Section 1917(c)(1)(A); 42 U.S.C.A. §1396p(c)(1)(A).] This look-back period is 36 months for the majority of asset transfers and is calculated back from the first date on which the individual is institutionalized and has applied for medical assistance. [Section 1917(c)(B)(i) & (ii); §1396p(c)(1)(B) (i) & (ii).] If during this look-back period the applicant has transferred assets for less than fair market value, he is deemed ineligible for medical assistance for a calculated penalty period.

Through estate planning, individuals who suspect they may be entering a nursing facility in the future are able to intentionally shift assets to third parties and completely avoid a penalty period of ineligibility. So long as the transfer is completed at least 36 months before the individual enters a nursing facility and applies for medical assistance, there will be no penalty period assessed because the transfer will not fall within the look-back period. Although not everyone can predict when they will enter a nursing home, the aged, the chronically ill, and their caretakers are often aware of how long home care will remain a viable option. With careful estate planning these individuals can divest assets worth significant sums of money and qualify for medical assistance immediately upon entering a nursing facility.

2.2. Proposed Change

The Commonwealth proposes to increase the look-back period to 60 months for transfers of real estate and to 120 months for transfers into irrevocable trusts.

Lengthening the look-back period for real property transfers from 36 months to 60 months and lengthening the look-back period for transfers into irrevocable trusts from 60 months to 120 months will decrease the opportunity for individuals to use estate planning to qualify for Medicaid and will increase the potential for discovering improper transfers of assets without significantly increasing administrative time or expenses. Increasing the look-back period for real property transfers and irrevocable trusts will not significantly increase administrative costs because transfers of real property and the creation of irrevocable trusts involve detailed paperwork and are, therefore, easy to trace. In addition, transfers of real property are generally significant in terms of dollar value so focusing on these transfers will allow the Commonwealth to discover more noteworthy violations of the regulations. The proposed extended look-back period will apply to all real property transfers not otherwise exempted under the current transfer of assets regulations. The transfer of a primary residence for fair market value up to $300,000 would also be exempt.

3. Transfer Penalty Period

3.1. The Problem

The length of the penalty period for asset transfers for less than fair market value is equal, in months, to the total uncompensated value of all assets transferred by the individual during the look-back period divided by the average monthly cost of nursing home care to a private patient in the state at the time of application. [Section 1917(c)(1)(E)(i).] The penalty period begins on the first day of the first month during which assets were transferred for less than fair market value. [Section 1917(c)(1)(D).] During the penalty period the individual cannot receive medical assistance for nursing facility services despite meeting all other eligibility requirements.

There are a variety of loopholes in determining the penalty period that allow individuals to fully or partially avoid the appropriate penalty. Under the current regulations, the penalty period begins on the first day of the month in which the transfer of assets occurs. Therefore, unless the transfer occurs close to the time in which the Medicaid application is filed, the individual may not feel any effect of the penalty period because the penalty period may expire prior to the date of application.

For example, if an individual transfers an asset with an uncompensated value of $60,000 one year prior to applying for medical assistance, and the average monthly cost of nursing home care in the state is $6,000, the penalty period imposed will be 10 months ($60,000/$6,000). The penalty period begins the first day of the month of transfer, one year (12 months) prior to the application. Thus, the penalty period ends before the individual applies for medical assistance. In this example, the individual immediately will receive full medical assistance for nursing facility services despite the transfer of assets for less than fair market value. If the individual had instead transferred an asset with an uncompensated value of $150,000 two years prior to applying for medical assistance, the penalty period would be 25 months ($150,000/$6,000). However, the individual would only be ineligible for medical assistance for one month of nursing facility services because the transfer was completed 24 months prior to application. As illustrated, this system allows an individual with the ability to pay for nursing facility services and a little bit of foresight to transfer assets in order to qualify for medical assistance and to suffer little or no penalty for his actions.

Even after entering a nursing facility, individuals can work around the current regulations to transfer assets and still qualify for Medicaid sooner than is appropriate. By balancing the cost of paying for nursing facility services during the period of ineligibility with the quantity of assets divested, the transferor can ensure that when the penalty period ends, he will qualify for medical assistance. For example, if an individual enters a nursing home with $302,000 in assets in a state where the Medicaid maximum asset eligibility level is $2,000 and the average monthly cost of nursing home care in the state is $6,000, he can calculate that he has $300,000 worth of excess assets ($302,000-$2,000). If, after he applies and is denied medical assistance, he gives away $150,000 worth of assets to a third-party, he will be deemed ineligible for Medicaid for a 25-month penalty period

($150,000/$6,000). However, he will have kept $150,000 worth of excess assets that he can use to pay for nursing facility services during this penalty period. At the end of the penalty period he will have spent down his excess assets to approximately $2,000 and he will qualify for medical assistance, even though he gave away $150,000.

3.2. Proposed Change

The Commonwealth proposes to change the start-date for the penalty period to the later date of entry into a nursing home, the date the person would have been eligible for Medicaid coverage of long-term institutionalized care had the transfer not occurred, or the date of the transfer. The Division is not proposing to make changes in how the penalty period is calculated.

By changing the start date for the penalty period, the opportunity to successfully use estate planning to qualify for Medicaid coverage will be substantially reduced. With this new start date, an individual who transfers assets improperly during the look-back period cannot avoid a penalty period, as often occurs under current law because the penalty period ends before the individual applies for assistance. Rather, the individual will endure the entire calculated period of ineligibility.

The regulations governing the transfer of assets should not provide an incentive for advanced estate planning. The proposed alteration to the start date for the penalty period will eliminate much of this incentive. Although individuals could continue to avoid penalty periods by transferring assets prior to the look-back period, estate planning in the short-term will be reduced. Individuals with the ability to pay for nursing facility services will have to pay for those services and the government will not be forced to spend money on those who can afford nursing home care.

Shifting forward in time the start date for the penalty period also will effectively end the use of any estate planning to qualify for Medicaid after an individual has entered a nursing facility. Because the penalty period will not begin until the individual is otherwise eligible for Medicaid coverage, the individual cannot force the penalty period to end earlier by applying for Medicaid coverage prematurely.

4. Annuities

4.1. The Problem

Section 1917(d)(6) states that the term "trust" includes annuities for transfer of asset analysis only to the extent the Secretary specifies. HCFA Transmittal 64 [*§3258.9(B), State Medicaid Manual, HCFA, No. 45-3, Transmittal 64 (Nov. 1994)*] is the only guidance ever provided by the Secretary. According to Transmittal 64, annuities are usually purchased in order to provide a source of income for retirement. However, they are also sometimes used to shelter assets so that the purchaser of the annuity or the purchaser's spouse can qualify for Medicaid. In order to capture those annuities that abusively shelter assets, while not penalizing annuities validly purchased as part of a retirement plan, Transmittal 64 states, "a determination must be made with regard to the ultimate purpose of the annuity (i.e., whether the purchase of the annuity constitutes a transfer of assets for less than fair market value). If the expected return on the annuity is commensurate with a reasonable estimate of the life expectancy of the beneficiary, the annuity can be deemed actuarially sound." If the annuity is not actuarially sound "and the individual is not reasonably expected to live longer than the guarantee period of the annuity, the individual will not receive fair market value for the annuity based on the projected return. In this case, the annuity is not actuarially sound and a transfer of assets for less than fair market value has taken place, subjecting the individual to a penalty."

Transmittal 64 clearly establishes that the purchase of a non-actuarially sound annuity should be treated as a transfer of assets for less than fair market value. What is not clear in Transmittal 64 is whether the purchase of an actuarially sound annuity is, by definition, a valid transfer of assets. A limited number of courts, both state and federal, have confronted this issue of interpretation. In the leading federal case, *Mertz v. Houston, 155 F.Supp.2d 415 (E.D. Pa. 2001),* the court determined that, under federal law, the Pennsylvania Department of Public Welfare could not assess a period of ineligibility for a fair market value transfer regardless of the intent of the transfer and that, under Transmittal 64, the fair market value of an annuity is determined exclusively by actuarial soundness. The court noted that its decision reflected a gaping loophole in the federal law allowing a couple to legally convert countable resources into income of the community spouse (which is not countable in determining Medicaid eligibility for the institutionalized spouse) by purchasing an irrevocable actuarially sound commercial annuity for the sole benefit of the community spouse.

If allowed to persist, this loophole will force Massachusetts to cover the cost of nursing home care for individuals who have the ability to pay but have transferred their assets into annuities. There are two scenarios in which annuities can be used to transfer assets without any penalty.

In one such scenario, if a woman enters a nursing home and wishes to qualify for Medicaid coverage, she can transfer her assets to her community spouse so he can purchase an annuity, or he can use their joint assets to purchase an annuity, where the annuity provides income to the community spouse. Neither the value of each annuity nor

the total value of the annuities purchased is capped by federal (or state) law. So long as the return on the annuity is commensurate with the community spouse's life expectancy, the transfer is deemed a fair market value transaction and the payments from the annuity, no matter how large, are viewed as income to the community spouse and not as assets. If the purchase of the annuity lowered the couple's asset level to, or below, the Medicaid qualifying amount, the institutionalized wife will qualify for Medicaid coverage of her long-term care expenses and no penalty period will be assessed. If the amount of money transferred into the annuity is large, the Commonwealth will be paying for the nursing home care of an individual with the ability to pay for such care herself. By allowing money to be siphoned out of the Medicaid pool in this manner, the state's efforts to provide a wide range of high-quality medical services to the truly needy are hindered. Closing, or at least narrowing, this loophole will allow the Commonwealth to better achieve its goals.

In the second scenario, the annuity is purchased by and for the benefit of the institutionalized individual (whether or not he has a community spouse), and the individual applies for and receives medical assistance. As long as the annuity pays out, in frequent equal installments, its full principal plus interest during the individual's life expectancy, the annuity is actuarially sound, and its purchase is for fair market value. If the individual lives to his full life expectancy, the state and federal governments are not harmed because the income from the annuity will become part of the "patient paid amount" and accordingly reduce medical assistance payments to the nursing home. However, only a certain percentage of individuals will live as long or longer than their life expectancy. The remainder of individuals will die before their life expectancy. In this case, the state does not receive in income the full value of the purchase price of the annuity. Thus, the state loses part of the purchase price. The effect is the same as if the lost portion was given away without a transfer of asset penalty.

4.2. Proposed Change

The Commonwealth proposes to classify the purchase of annuities during the look-back period as transfers for less than fair market value unless the Commonwealth is named as a remainder beneficiary of the annuity for a value up to the total amount expended by MassHealth for the individual's institutionalized care.

Compelling individuals to name the Commonwealth as a remainder beneficiary to their annuities reflects the intent behind Transmittal 64 but also narrows the loophole created therein. Under this new regulation, an institutionalized individual will remain able to utilize annuities as a tool to turn his or her assets into an income stream for the care of himself or the community spouse. However, the institutionalized individual will not be able to hide excess assets or remove them from the reach of the Commonwealth by placing them in an annuity. The Commonwealth recognizes that it is often necessary and beneficial to provide community spouses with income streams from annuities so that they may live comfortable, independent lives. However, if a community spouse passes away, the income from an annuity is no longer necessary and remaining payments should revert to the Commonwealth to cover expenditures for the long-term care of the institutionalized

spouse. In essence, the Commonwealth is seeking to treat the remaining annuity payments as excess assets belonging to the institutionalized spouse. Asking for remaining funds to revert to the Commonwealth to cover long-term care expenditures when they are no longer of use to either the institutionalized spouse or the community spouse is reasonable and in concert with the intent expressed in Transmittal 64 to allow for retirement planning but prevent abusive sheltering of assets.

The federal government has already implemented a scheme in which certain trusts are allowed special treatment because the State is the mandated beneficiary of the remainder of the trust. Under Section 1917(d)(4)(A), a trust containing the assets of an individual who is disabled is not considered a resource available to the individual "if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under [the] State plan … " The reasoning behind this special treatment of trusts for the disabled is similar to the Commonwealth's reasoning behind the special treatment of annuities with the Commonwealth as the primary remainder beneficiary, namely, that it is fair for a Medicaid recipient to convert assets into income as long as the state is able to recoup the amount it spent on the recipient's nursing home care. .

Under the new regulation, the fair market value of annuities with the Commonwealth as a named remainder beneficiary will continue to depend on actuarial soundness. The expected return on the annuity must be commensurate with a reasonable estimate of the life expectancy of the community spouse as determined by the tables provided in Transmittal 64. Annuities with the Commonwealth as a beneficiary that are not actuarially sound will be deemed transfers for less than fair market value.

If an annuity is purchased during the look-back period and the Commonwealth is not named as a remainder beneficiary, the Medicaid applicant, or his/her spouse, will be expected to amend the annuity agreement to include the Commonwealth as the primary remainder beneficiary, up to the amount spent by MassHealth on the provision of long-term care for the institutionalized spouse. Most annuities can be amended easily to add, remove, or change beneficiaries. If an annuity agreement cannot be amended and the Commonwealth cannot be added as a beneficiary, the purchase of the annuity will be treated as a transfer for less than fair market value.

(Note that the waiver required is to the transfer and trust rules, specifically Section 1917(d)(6) as it pertains to the purchase of annuities, permitting the Commonwealth to treat an annuity similarly to a trust under Section 1917(d)(4)(A). No change is needed that would require a waiver of any of the spousal impoverishment provisions in Section 1924.)

5. Expenditure of Excess Assets

5.1. The Problem

When individuals apply for Medicaid coverage, their assets are evaluated to provide a "snapshot" to both the applicant and the Division of Medical Assistance. Under the current regulations, if the snapshot reveals assets exceeding the Medicaid eligibility level, the applicant can spend down those assets by engaging in transactions for fair market value. There is no limitation on what type of transactions applicants can engage in to spend down their assets. Some applicants take advantage of this loophole to purchase luxury items or to enter into transactions unnecessary for their continued health and comfort. For example, applicants have spent down their assets by installing swimming pools, constructing elaborate additions to their homes, and purchasing expensive automobiles. It is the Commonwealth's opinion that allowable spend-down transactions by an individual who has applied for and/or been denied for Medicaid coverage should be restricted to covering medical expenses, necessary living expenses, and specific types of annuities. Individuals seeking Medicaid coverage should not be allowed to spend down their assets by purchasing frivolous or unnecessary items for fair market value without incurring a penalty period.

5.2. Proposed Change

The Commonwealth proposes to change the treatment of assets transferred after the spousal assessment, or after the applicant has been denied MassHealth due to excess assets, such that all expenditures are deemed to be transfers for less than fair market value unless they are used for:

1. Medical care;
2. Necessary living expenses;
3. Necessary home maintenance (not home improvements);
4. To purchase an actuarially sound annuity that names the Commonwealth of Massachusetts as a remainder beneficiary for a value up to the total amount expended by MassHealth for the individual's institutionalized care;
5. To purchase an actuarially sound annuity that provides the community spouse with a monthly income of no more than the MMMNA when combined with other sources of income; or
6. To purchase long-term care insurance for the benefit of the applicant or spouse, with satisfies standards determined by the Division

Spending down assets by paying the fair market value for medical care, necessary living expenses, and necessary home maintenance is a valid and reasonable activity. Necessary living expenses include such items as groceries, transportation, clothes, utilities, and other day-to-day expenditures. Frequently, Medicaid applicants spend down their assets by making significant improvements to their homes, thereby increasing the value of their home and decreasing their asset level. Although home maintenance is necessary for an individual to remain comfortably in the community, improvements such as swimming pools and newly renovated kitchens are not necessary. The Commonwealth does not

think it appropriate for individuals seeking Medicaid coverage to spend money on major home improvements rather than on their own medical care. Under this new regulation, individuals who have been denied MassHealth coverage for excess assets or who have undergone a spousal assessment will not be able to avoid a penalty period by spending down their assets through fair market value transactions for unreasonable expenses. Rather, purchases for fair market value of items that do not qualify as medical expenses, necessary living expenses, or necessary home maintenance expenses will be evaluated as if they were purchases for less than fair market value and an appropriate penalty period will be assessed.

Purchasing an annuity after a spousal assessment or a denial of benefits for the purpose of providing a community spouse with a steady income is a reasonable way to spend down assets as long as the annuity is actuarially sound and complies with one of the following two conditions: (1) it names the Commonwealth as the primary remainder beneficiary of the annuity up to the amount of money expended by the Commonwealth for the care of the institutionalized spouse or (2) its payments to the community spouse do not exceed the MMMNA when combined with other sources of income. Under the new proposed regulation, the purchase of actuarially sound annuities that comply with one of these two conditions will not be penalized. Annuities that are not actuarially sound or do not comply with one of these two conditions will be treated as transfers of assets for less than fair market value.

As discussed above, there is good reason for requiring individuals to name the Commonwealth as the primary remainder beneficiary of an annuity providing income to the community spouse. There is also good reason to require, in the alternative, that the annuity payments to the community spouse not exceed the calculated MMMNA when combined with other sources of income. Under the current regulations there is no cap on the total assets transferred into an annuity or annuities. This allows for couples to transfer extremely large sums of money into annuities and, as long as the annuities are actuarially sound, to suffer no penalty. To have an institutionalized spouse receiving Medicaid coverage and a community spouse receiving large sums of money in the form of annuity payments each month is unfair to both the Commonwealth and the truly needy. The MMMNA is designed to reflect the income needed by the community spouse to live comfortably. Payments from an allowable annuity should similarly reflect the income needed by the community spouse to live comfortably. The proposed regulation allows the community spouse to benefit from the purchase of an annuity, but not to benefit in such a way as to be sheltering excess assets from the Commonwealth.

6. Large Transfers of Non-countable Assets

6.1. The Problem

Under current law, only transfers for less than the fair market value of homes and other countable "resources" [as defined in Section 1917(e)(5)], such as cash and real estate, are factored into the calculation of the penalty period. Transfers of other "non-countable" assets, such as household goods, automobiles, and personal effects do not play a role. Many non-countable assets are of minimal value and their inclusion would not make a profound difference in the length of the penalty period. However, the transfer of items such as valuable jewelry or automobiles may entail a more significant shift of asset value. Rather than selling or otherwise utilizing these valuable assets to help pay for their nursing home care, applicants are able to give these assets away for free without penalty.

6.2. Proposed Change

The Commonwealth proposes to include the transfers of non-countable assets in the calculation of the penalty period if the fair market value of the non-countable assets is greater than $20,000.

Under this Demonstration Project, transfers of non-countable assets with a fair market value of greater than $20,000 will be included in the calculation of the penalty period. It is the Commonwealth's belief that beneficiaries with non-countable assets worth more than $20,000 are not in positions of financial need and should use those assets to pay for institutionalized care before Medicaid steps in to cover costs. Including the transfer of valuable non-countable assets in the calculation of the penalty period will prevent applicants with significant wealth from qualifying for Medicaid coverage of institutionalized long-term care.

7. Sequential Transfers from Permissible to Non-Permissible Parties

7.1. The Problem

Beneficiaries are able to use successive transfers during the look-back period to deliver assets to an impermissible third-party while avoiding a penalty. The current regulations allow an applicant to transfer assets without penalty to a spouse, a disabled child, a child under the age of 21, another individual for the sole benefit of the spouse, certain siblings, or certain caretaker children. These transfers are not penalized because it is assumed that they will be used to care for an individual who is, at least partially, reliant on the Medicaid applicant for support. By first transferring the assets to an exempted recipient and then having that recipient transfer the assets to the impermissible party, the assets reach the desired individual without penalty. There is no investigation into the disposition of assets once they are transferred to exempted recipients. Therefore, there is no guarantee that the assets, or the value of the assets, remain in the hands of those they are expected to support.

Sequential transactions like these have occasionally been caught where they occur on the same day using documents written by the same attorney. It is likely that many such transactions are missed because current rules do not permit inquiry beyond the first permissible transfer.

7.2. Proposed Change

The Commonwealth proposes to penalize "suspicious" successive transfers of assets as transfers for less than fair market value; for example, where the first transfer is a permitted transfer that is immediately followed by a further transfer of the same property that would have been impermissible had it occurred first.

By tracing the disposition of transferred assets one step beyond the transfer from the applicant to the exempted recipient, the Commonwealth will be able to close the loophole created by the exemption for transfers of assets to a spouse, a disabled child, a child under the age of 21, another individual for the sole benefit of the spouse, a certain sibling, or a certain caretaker child. Under the Demonstration Project, successive transfers first to an exempted recipient and then, a short time thereafter, to a non-exempted recipient will be treated as a transfer for less than fair market value. Assessing penalty periods for successive transfers will deter, and potentially end, the use of exempted individuals as intermediaries in plots designed to deliver assets to non-exempted third parties and to avoid a penalty period. The exemptions were not designed to ease an applicant's transfer of assets to others in order to qualify for Medicaid coverage, but rather to allow a Medicaid applicant to support his or her dependents. By tightening the regulations surrounding successive transfers, that purpose will be fulfilled. (Spousal impoverishment rules will not be affected.)

8. Equity Loans

8.1. The Problem

An institutionalized Medicaid applicant or the community spouse of an institutionalized Medicaid applicant can also use the current regulations regarding equity loans to retain additional assets under the guise of an excess shelter allowance. An equity loan may be obtained for any purpose. The equity loan does not need to be related to the home in any way. For example, a community spouse can take out an equity loan to pay for a child's or grandchild's wedding, increase mortgage payments to account for that loan, and then apply and qualify for an increased spousal income allowance. The original intent of the equity loan provision was to allow community spouses to keep their homes in good condition; it was not intended to allow community spouses to channel money away from Medicaid to pay for non-living, non-maintenance, and non-medical related items. By allowing a community spouse to retain additional income to pay for non-living, non-maintenance, and non-medical related expenses, the Commonwealth ends up paying for care that the couple could have afforded themselves. This excess coverage by the Commonwealth is equal to the difference between the community spouse's standard spousal income allowance and the inflated spousal income allowance.

8.2. Proposed Change

The Commonwealth proposes to address this problem by treating the portion of mortgage payments that is attributable to an equity loan as transfers of assets for less than fair market value, to the extent that the amount of the equity loan was not used for necessary home maintenance, medically necessary health care, or necessary living expenses. Each payment will be treated as a transfer, subject to the cumulative limits described in Section 9.2 below.

With this change, the Commonwealth will deter institutionalized applicants and community spouses from taking out equity loans to pay for non-living, non-maintenance, and non-medical related items. This will enable the Commonwealth to avoid paying for the nursing home care of those who have purchased non-living, non-maintenance, and non-medical items using the amounts received from equity loans. The Commonwealth will treat mortgage payments to pay back loans used to pay for nonessential items similarly to Section 6 above.

9. Hardship Protections and Other Limitations

9.1. Hardship Protections

While implementing this Demonstration Project, the Commonwealth will take care to provide protection for vulnerable populations, such as individuals who have been defrauded. The Division's current rules for exemption for undue hardship would apply under the proposed Demonstration Project. Under this exemption, if a beneficiary can show that the penalty period would impose an undue hardship then no penalty is imposed. This exemption rebuts any argument that the proposed changes would have a negative consequence on affected beneficiaries at the time they need care the most. If a beneficiary is truly in need, he will be exempted from the penalty period. The requirements for demonstrating undue hardship are described by the Commonwealth as follows in its regulations [130 C.M.R. §520.019(K)]:

(1) The Division may waive a period of ineligibility due to a disqualifying transfer of resources if ineligibility would cause the nursing-facility resident undue hardship. The Division may waive the entire period of ineligibility or only a portion when all of the following circumstances exist.

> (a) The denial of MassHealth would deprive the nursing-facility resident of medical care such that his or her health or life would be endangered, or the nursing-facility resident would be deprived of food, shelter, clothing, or other necessities such that he or she would be at risk of serious deprivation.
>
> (b) All appropriate attempts to retrieve the transferred resource have been exhausted, and the recipient of the transfer is unable or unwilling to return the resource or to provide adequate compensation to the nursing-facility resident.
>
> (c) The institution has notified the nursing-facility resident of its intent to initiate a discharge of the resident because the resident has not paid for his or her institutionalization.
>
> (d) There is no less costly non-institutional alternative available to meet the nursing-facility resident's needs.

(2) Undue hardship does not exist when imposition of the period of ineligibility would merely inconvenience or restrict the nursing-facility resident without putting the nursing-facility resident at risk of serious deprivation.

Applicants also will be able to avoid a penalty period if they can show that they meant to transfer the asset for fair market value or other valuable consideration, that they transferred the asset exclusively for a reason other than to qualify for medical assistance, or that all of the transferred assets have been returned to them. (§1396p(c)(2)(C).) In conjunction with the undue hardship exemption, these provisions work to protect those

applicants who have been defrauded by others or who have transferred assets with no intention of defrauding the State.

The proposed threshold levels provide additional protection for vulnerable populations. (See Section 9.2 below.) If the total uncompensated value of the transfer of assets is below the threshold level, then the transfers will not be investigated and no penalty will be assessed. These threshold levels will serve to protect those who believed they were transferring assets for fair market value and those who transferred only small sums during the look-back period.

Example:

> This is an example of how the Division has granted a hardship waiver from a transfer penalty arising from the below fair market value transfer of the applicant's home.
>
> The applicant applied for long-term care benefits on December 31, 2001. She had transferred her home to her tenant on October 16, 2000, for $50,000. The home was valued at $211,000.
>
> The applicant had owned her two-family home in Brighton since 1974. Her husband was deceased. In June 2000, the applicant had become ill with a series of strokes throughout the summer. Throughout the summer and fall of 2000 she had continuous hospital and rehab stays, with sort periods of time at home. She entered a nursing facility on December 18, 2000.
>
> The transfer of the applicant's home occurred after her return home from the hospital on October 4, 2000. The applicant's tenant had lived in the adjoining unit since 1998. The tenant helped pay bills and maintained the applicant's home while the applicant was in the hospital from June to October 2000. The applicant has no surviving friends and her only surviving family were a nephew in California and a niece and nephew in Pennsylvania.
>
> When the applicant returned home on October 4, 2000, her tenant said she was moving out unless the home were "sold" to her for $50,000. The applicant did so on October 16, 2000, twelve days after being discharged from the hospital. The property was assessed to be worth $211,000 at the time. After staff at the nursing home where the applicant was residing became aware that her home was taken, a Conservator was appointed for her. The applicant's physician stated by letter that the applicant was not competent to sign a deed and was weak from months of illness. The Conservator requested that the tenant and her attorney return the home. The tenant refused and the applicant's Conservator filed an action in Probate Court. At the time of Medicaid application, the case had not yet been heard.

Based on the facts as presented, the Division granted the hardship request and did not impose a transfer of asset penalty. The Division also asked for notification in the event the house was returned.

9.2. Thresholds for Improper Transfers Contributing to the Penalty Period

Although, ideally, all transfers of assets for less than fair market value would be included in the calculation of a penalty period, using threshold amounts to limit the number and size of improper transfers included in the penalty period calculation will allow the Commonwealth to focus on larger transfers, to reduce administrative time and expenses, and to reduce the complication of the application process.

Under this Demonstration Project, threshold amounts would be established for three stages of the look-back period. If the total uncompensated value of transferred assets does not exceed the threshold level for the stage of the look-back period during which the transfer took place, then those transfers will not be treated under the new rules of this Demonstration Project.

The Commonwealth proposes the following threshold levels:

1. No thresholds for transfers made less than 1 year preceding application for Medicaid coverage for nursing facility services.
2. $2,500 for cumulative transfers made between 1 year and 2 years preceding application for Medicaid coverage for nursing facility services.
3. $5,000 for cumulative transfers made between 2 years and 5 years preceding application for Medicaid coverage for nursing facility services.
4. $10,000 for cumulative transfers made between 5 years and 10 years preceding application for Medicaid coverage for nursing facility services.

The transfers need not overlap to be cumulated.

The establishment of thresholds in the Demonstration Project will not increase costs to the government. The threshold evaluation will be worked into the methodology used to review asset histories and should not increase the amount of time spent reviewing. In addition, the Commonwealth believes there will be a decrease in the number of transfers under the Demonstration Project and, therefore, administrative costs should not increase as there will be fewer transfers to review.

9.3. Exclusion of Certain Transfers of Primary Residences

The Massachusetts Legislature has mandated that the provisions of this Demonstration Project shall not apply to any transfer of a primary residence up to a value of $300,000. (This legislation is discussed below in Section 10.) This means the following:

- If a primary residence with a fair market value of $300,000 or less is transferred without compensation, then the transfer will be treated under existing law as

though a waiver was not in effect. The same will apply if the net uncompensated value of the transfer of a primary residence is $300,000 or less;
- If a primary residence with a fair market value of, say, $500,000 is transferred without compensation, then $200,000 of the transfer will be treated under the waiver, and the remaining $300,000 will be treated under existing law as though a waiver was not in effect. The same principle will apply if the uncompensated value of the transfer of the primary residence is over $300,000.

In applying the exclusion where the uncompensated value of the transfer exceeds $300,000, the extended look-back period under the Demonstration Project will apply. Where the transfer could only be penalized under the extended look-back period, the penalty period will be calculated based on the amount of the transfer that exceeds $300,000. The penalty period so calculated will be applied prospectively under the rules of the Demonstration Project.

In applying the exclusion where the uncompensated value of the transfer exceeds $300,000 but occurs within the look-back period under current law, the penalty period based on a transfer of $300,000 will begin with the date of the transfer, but the penalty period on the remaining amount transferred will begin prospectively under the rules of the Demonstration Project.

9.4. Other Limitations

- Persons living in the community and receiving long-term care in lieu of institutionalization will not be affected by the rules under this Demonstration Project;
- No changes will be made in the methodology for calculating the length of the penalty period;
- No changes will be made in the rules establishing permissible transfers [Section 1917(c)(2)], except as provided in Section 7 above (pertaining to sequential transfers).
- No changes will be made to the "spousal impoverishment" rules (Section 1924 of the Social Security Act).

10. Public Notice and Comment

10.1. Legislative Approval

The Massachusetts Legislature has authorized the Commonwealth to apply for this Demonstration Project and to implement it when it is approved. The legislative language, effective July 1, 2003, inserts the following provision into the Massachusetts General Laws:

> The secretary of health and human services may apply for authority from the secretary of the United States Department of Health and Human Services, pursuant to section 1115 of the Social Security Act that authorizes the secretary to waive provisions of Title XIX of the Social Security Act, to implement measures that: (1) change to a later date the time currently provided by federal law for starting the penalty periods for persons who transfer assets for less than fair market value; (2) require excess assets to be spent on health care or other necessary living expenses; (3) to treat annuities similarly to trusts and require the commonwealth to be a beneficiary to the extent of MassHealth benefits provided; and (4) increase look-back periods, for real estate transfers and transfers into irrevocable trusts; provided that any changes implemented as a result of a waiver authorized by this section shall not apply to new applications submitted before the effective date of this section or the effective date of any waiver granted, whichever is later; and provided further, that transfers of assets up to $300,000 from a primary residence shall not be affected by such waiver. The division or the department of elder affairs, as appropriate, may by regulation implement one or more of such measures under the terms and conditions approved by the secretary, provided that the division or the department, as appropriate, shall waive such measures to address hardships as determined by the division or department.

10.2. Public Notice of Regulations

If the demonstration project is approved, the Commonwealth will implement the project only after regulations have been published in the *Massachusetts Register* and after a public notice and public comment, as provided by Massachusetts General Laws, Chapter 30A. Public notice will include publication in newspapers. The period of public comment must be at least 21 days prior to the adoption of the regulations. (See Section 1.3 above for discussion on the effective date.)

The notices in newspapers and the *Massachusetts Register*, along with notices that go to those who place themselves on a list to receive such notices, will reach relevant advocacy groups, nursing homes, estate planners, and trade associations. One estate planning law firm which has a national mailing list, Margolis and Associates of Boston, has already distributed one of its publications, "Massachusetts Update" (Spring 2003), which describes the proposed transfer penalty start date contained in this Demonstration Project proposal and discussed the legislation, described above, which subsequently was enacted

into law. Thus, this proposed Demonstration Project has already received significant publicity and is known to affected groups.

11. Budget Neutrality

11.1. Approach

This Demonstration Project is expected to delay the date of entry into MassHealth covered nursing home care for individuals who inappropriately transfer certain assets during the extended look-back period. This will achieve savings by decreasing the number of new entries into MassHealth covered nursing home care during the waiver year. Since there are essentially no new costs associated with this Demonstration, the Demonstration Project is by definition budget neutral.

To demonstrate budget neutrality over the course of the waiver, the Commonwealth will show that the cost of providing services to the population under the waiver, the "with waiver" costs, will be equal to or less than the costs would have been to provide services to this population without a waiver, the "without waiver" costs. The "without waiver" costs are also referred to as the "budget neutrality ceiling."

To track budget neutrality over the waiver period, the Commonwealth would estimate the caseload and costs of members who entered MassHealth covered nursing home care after the start of the waiver. This would be compared to a "without waiver" caseload and cost estimate. The "without waiver" cost estimate would be based on projected caseload and actual per member per month (PMPM) costs of MassHealth covered nursing home care for the non-waiver population, adjusted for the acuity of the waiver population. This is described in detail below.

This section includes a projection of how the Commonwealth anticipates the budget neutrality calculations will likely occur during the course of the waiver. In this projection, the PMPM amounts for both the "with waiver" and "without waiver" calculations will be the same. Therefore, the PMPM amounts included here are for illustrative purposes only. Similarly, since "with waiver" caseload amounts will be based on actual enrollment, the "with waiver" caseload estimates are intended to show what the Commonwealth expects to occur over the waiver period, but are not intended to be used for the actual demonstration of budget neutrality over the course of the waiver. In contrast, the "without waiver" caseload projections would be used in calculating the actual budget neutrality ceiling.

11.2. Tracking Budget Neutrality During Waiver Implementation

To demonstrate budget neutrality during waiver implementation, the Commonwealth would compare the actual expenditures of the waiver population to the projected "without waiver" expenditures. The "without waiver" expenditures would be calculated by multiplying the projected "without waiver" caseload by the actual PMPM for the non-waiver population, adjusted for casemix. The following sections describe both how the "without waiver" caseload was estimated and how the actual PMPM of the non-waiver population will be casemix adjusted for the waiver population.

"Without Waiver" Calculation

Caseload Projections

The "without waiver" caseload is defined as the number of members who enter MassHealth covered nursing home care after the start of the waiver period and is given in "member months." "Without waiver" caseload projections are based on historical monthly caseload data (see subsequent paragraph). For the "without waiver" projection, the group of members who enters the waiver population for each month within the five-year waiver period is treated as a separate cohort. The "without waiver" caseload estimate is therefore based on 60 separate cohorts (12 cohorts/year X 5 years). Within each cohort, the Commonwealth projected how many members would be in the waiver population for each month of the waiver period. The number of members in all cohorts is then totaled per month, resulting in the total projected caseload for each month of the waiver period (See Attachment A).

To make the above estimate of the number of members who will enter the wavier population during the waiver period, the Commonwealth calculated the average number of members who entered MassHealth covered nursing home care for each month based on the historical data maintained by the Division for FY 2000 through FY2002. Specifically, the Commonwealth identified by month all members with a nursing home claim who did not have any MassHealth claims for the previous year. Using this data, the Commonwealth calculated the average number of members who enter MassHealth covered nursing home service each month. (See Attachment B.)

To project the entire waiver population, the Commonwealth then estimated how long these new waiver members (see Attachment A) would remain in MassHealth. To do this, the Commonwealth examined data for the period FY1999 to FY2001 to determine how long members remained on MassHealth once MassHealth covered nursing home care. Specifically, the Commonwealth calculated what percent of the members who entered the roles each month remained on the roles in subsequent months. For example, if 1,000 members entered the roles in July (month 1), the Commonwealth looked at the proportion of those 1,000 members who remained on MassHealth in August (month 2), September (month 3), and so on. The Commonwealth then averaged the percent of members who remained on the roles for each of the subsequent months (month 2, month 3 and so on) across FY2000-FY2002 (See Attachment C)[1]. The length of stay determined by this method was then applied to the number of members entering the waiver, calculated earlier, to determine the "without waiver" caseload.

[1] Member months represent both the number of members on a caseload and the length of time those members remain on the caseload. Because members are represented using member months, the caseload in month 2 will generally be higher than the caseload in month 1. This is due to the high probability that members were not eligible for each day of month 1.

Without Waiver Caseload Projections

	FY2004	FY2005	FY2006	FY2007	FY2008
Caseload (in Member Months)	104,170	260,084	379,151	472,689	479,501

Per Member Per Month (PMPM) Cost Estimates

The PMPM costs that would be used in calculating the budget neutrality ceiling would be derived from the PMPM costs for the non-waiver population, adjusted for case mix. To adjust for case mix, the Commonwealth would calculate the cost of the waiver population using the same method that is currently used to calculate payments to nursing facilities for the non-waiver population. Currently, payments are calculated based on 10 casemix categories and 6 payment groups: H, J&K, L&M, N&P, R&S, and T. Each member has a specific case mix level and each nursing facility has specific payment rates for the casemix categories and payment groups. The facility's payment is the total of each member's specific rate.

11.3. Projecting Budget Neutrality Before Waiver Implementation

The following calculation demonstrates how the Commonwealth anticipates the budget neutrality will look over the course of the waiver.

"Without Waiver" Caseload

In this calculation, the "without waiver" member months are equal to the "without waiver" caseload as calculated in the section regarding "Tracking Budget Neutrality During the Course of the Waiver."

"With Waiver" Caseload

The "with waiver" caseload was estimated by using the "without waiver" caseload projections and subtracting out members who likely would be diverted due to provisions within this demonstration project. There is little national or state level data that can be used to estimate how many people will likely improperly transfer assets. The Commonwealth is therefore assuming conservative diversion rates in this calculation to illustrate how diversions are expected to work within this Demonstration Project. Calculations of the "with waiver" estimate as described below are found in Attachment E. Diversion estimates are broken into three major categories:

Changing the Start Date of the Penalty Period

Changing the start date of the penalty period will require individuals who improperly transfer assets to serve their penalty period after they apply for nursing home care. Currently, many such members have served the penalty period before they needed nursing home care. There is little data in Massachusetts regarding how many individuals are currently subject to such a penalty period. However, in its pending 1115 Waiver application, the State of Connecticut estimates that over

one-third of the nursing home population made improper asset transfers, and that these transfers were worth an average of about $32,000 in 1997 dollars. The Commonwealth, therefore, made the conservative assumption that 5% of the population would have their diversion period shifted to begin after the start of their nursing home care. Additionally, the length of the penalty period was based on an assumed transfer amount of $33,000 in 2004 dollars.

Increased Look-Back Period

The increased look-back period likely will increase the number of individuals who are identified as having made improper asset transfers. The Commonwealth assumed that 1% of the population entering nursing home care would be found to have made improper transfers during the look-back period. Additionally, the Commonwealth assumed that the average transfer amount, $33,000 in 2004 dollars, would be the same as for transfers made during the current penalty period.

Change in Treatment of Annuities and Change in the Treatment of Excess Assets

The Commonwealth anticipates that there will be some diversion as a result of the changes in the treatment of annuities and excess assets. However, based on anecdotal data, the Commonwealth believes that the effect on diversions will be small. For this exercise, the number of diversions attributed to these changes is therefore zero.

"With Waiver" and "Without Waiver" PMPM

The PMPMs for the "with waiver" and "without waiver" calculations are the same and are based on historical data. The PMPMs are based on the Division's projected average PMPM for the total MassHealth institutional senior population. The MassHealth Budget Unit estimates that the PMPM for this population will average $4,195 in FY2004. Assuming that the PMPM grows by 7% annually, the PMPM over the waiver period would be as follows:

Per Member Per Month Cost Estimates

	FY2004	FY2005	FY2006	FY2007	FY2008
Institutional Seniors	$4,195	$4,488	$4,802	$5,138	$5,498

11.4 Projected Budget Neutrality

Using the methods describe above to calculate the "with waiver" and "without waiver" PMPM costs and caseload levels, the Demonstration will reduce total program costs by $53.6 million over the waiver period. The Commonwealth, therefore, asserts that this Demonstration Project will be budget neutral.

Without Waiver

	FY2004	FY2005	FY2006	FY2007	FY2008	Waiver Period Total
Caseload	104,170	260,084	379,151	472,689	479,501	
PMPM	$4,195	$4,488	$4,802	$5,138	$5,498	
Total	$436,940,605	$1,167,286,427	$1,820,790,798	$2,428,891,009	$2,636,364,697	$8,490,273,536

With Waiver

	FY2004	FY2005	FY2006	FY2007	FY2008	Waiver Period Total
Caseload	102,364	256,899	376,724	470,783	477,632	
PMPM	$4,195	$4,488	$4,802	$5,138	$5,498	
Total	$429,366,209	$1,152,992,716	$1,809,138,311	$2,419,093,020	$2,626,087,531	$8,436,677,787

Variance

	FY2004	FY2005	FY2006	FY2007	FY2008	Waiver Period Total
Total	$7,574,396	$14,293,711	$11,652,487	$9,797,990	$10,277,165	$ 53,595,749

12. Administration and Implementation

The Division of Medical Assistance will implement the Demonstration Project through its four MassHealth Enrollment Centers (MECs) using the same resources that it currently uses to evaluate applications for nursing facility services. The Commonwealth does not anticipate any significant additional administrative costs.

The Division currently enforces asset transfer penalties during the application process for new applications and during the redetermination process for ongoing members. During the application process the individual applying for assistance is asked if there have been any transfers of assets within a certain period of time prior to the application. These questions are followed up by a comparison and evaluation of tax documents that also list assets owned by the applicant. Legal documents such as trusts, annuities, promissory notes, and deeds are sent to the Division's Central Office for legal review.

These current processes and procedures will be changed to incorporate the new rules of the Demonstration Project. Whenever a new policy initiative is implemented, Division staff will receive a comprehensive overview and training by an onsite training specialist assigned to each of our MECs. In addition, the Central Office's Member Services and Legal units will quickly address questions that MEC workers may have regarding administering the new rules.

13. **Evaluation**

The Commonwealth will evaluate the success of this Demonstration Project by devising ways to measure outcomes to test the following hypotheses:

1. Fewer instances of voluntary impoverishment to obtain Medicaid payment of nursing home care will occur.
2. The method of spending down excess assets will change in a way that increases an individual's expenditures for essential expenses, including medical care, and decreases their expenditures for nonessential items.
3. Federal and state medical assistance expenditures for institutionalized long-term care will grow at a slower rate.
4. Tightening asset transfer policies will encourage the purchase of long-term care insurance policies.

The Division of Medical Assistance is currently gathering data on transfers of assets and spend-down behavior to serve as a baseline. If these hypotheses are confirmed, they will provide a basis for changing federal law to incorporate the rules of this Demonstration Project.

14. **Waivers Requested**

This Demonstration Project requires waivers from Title XIX of the Social Security Act. Section 1115(a)(1) of the Social Security Act permits the Secretary of the U.S. Department of Health and Human Services (the Secretary) to waive compliance with any of the requirements of §1902 of the Social Security Act, which specifies State Medicaid Plan requirements, to the extent and for the period necessary to carry out the Demonstration Project. Massachusetts requests that the Secretary waive the following Title XIX provisions:

1. Under §1902(a)(18) a State must "comply with the provisions of section 1917 with respect to liens, adjustments and recoveries of medical assistance correctly paid, transfers of assets, and treatment of certain trusts." Section 1917(c)(4) states, "A State (including a State which has elected treatment under section 1396a(f) of this title) may not provide for any period of ineligibility for an individual due to transfer of resources for less than fair market value except in accordance with this subsection."

   A waiver of §1902(a)(18) is necessary for the Commonwealth to implement all parts of this Demonstration Project. Through the waiver of §1902(a)(18), the specific provisions of §1917 that would be waived are as follows:

   A. *The Look-Back Period.* Under §1917(c)(1)(B)(i) and (ii) the look-back period is established as beginning 36 months (or, in the case of certain trusts, 60 months) prior to the date an institutionalized individual applies for medical assistance under the State plan or a non-institutionalized individual applies for medical assistance under the State plan or, if later, the date on which the individual disposes of assets for less than fair market value. A waiver of this provision is necessary to change the look-back period as described in Section 2 above.

   B. *Transfer Penalty Period.* Under §1917(c)(1)(D) the start date for a penalty period "is the first day of the first month during or after which assets have been transferred for less than fair market value and which does not occur in any other periods of ineligibility." A waiver of this provision is necessary for the Commonwealth to change the start date for a penalty period as described in Section 3 above.

   C. *Annuities.* Under §1917(d)(6), "The term 'trust' includes any legal instrument or device that is similar to a trust but includes an annuity only to the extent and in such manner as the Secretary specifies." A waiver of this provision is necessary for the Commonwealth to treat annuities as described in Section 4 above.

   D. *Expenditure of Excess Assets.* Section 1917(c)(1)(A) penalizes only transfers for less than fair market value, and §1917(c)(2) specifies permissible transfers of assets. A waiver of these provisions is necessary for the Commonwealth to limit the permissible transfers of assets as described in Section 5 above.

E. *Large Transfers of Non-countable Assets.* Section 1917(e) defines assets (called "resources" in federal law) as having "the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section." A waiver of this provision is necessary for the Commonwealth to expand the definition of assets subject to the transfer penalty as described in Section 6 above.

F. *Sequential Transfers from Permissible to Impermissible Parties*. Section 1917(c)(2) specifies permissible transfers of assets. A waiver of this provision is necessary for the Commonwealth to make exceptions to permissible transfers of assets as described in Section 7 above.

G. *Equity Loans.* Section 1917(e) defines assets (called "resources" in federal law) as having "the meaning given such term in section 1382b of this title, without regard (in the case of an institutionalized individual) to the exclusion described in subsection (a)(1) of such section." A waiver of this provision is necessary for the Commonwealth to expand the definition of assets subject to the transfer penalty as described in Section 8 above.

H. *Other Limitations.* Under §1917(c)(1)(E)(i) and (ii) the penalty assessed must take into account the total uncompensated value of all assets transferred by the individual. A waiver of these provisions is necessary for the Commonwealth to implement the use of threshold levels for determining what transfers contribute to the penalty period, as described in Section 9.2 above. No waiver is necessary for the hardship provisions described in Section 9.1 above, as those provisions are currently authorized under Section 1917(c)(2)(D). No waiver is necessary for the home transfer exclusion described in Section 9.3 above, as these exclusions apply only to new rules under the Demonstration Project and current law would apply to such transfers.

2. Other Provisions: The Commonwealth requests that the Secretary grant any other waiver deemed necessary in order to implement the Demonstration Project described herein.